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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

ATHENA CIELEN,
Petitioner,

vs.

AETNA LIFE INSURANCE COMPANY, a Corporation, and
THE TRAVELERS INSURANCE COMPANY,
a Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI

**To the Appellate Court of the State of Illinois,
First Judicial District.**

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PETITION FOR WRIT OF CERTIORARI

**To the Appellate Court of the State of Illinois,
First Judicial District.**

The petitioner, Athena Cielen, prays that a Writ of Certiorari be issued to review the judgment of the Illinois Appellate Court, First District, made final by the denial by the Illinois Supreme Court, on January 9, 1968, of petitioner's Motion for reconsideration of the Order of the Illinois Supreme Court, denying Petition for Leave to Appeal.

OPINION BELOW.

The Opinion of the Illinois Appellate Court, First District, is reported in full in 81 Ill. App. 2d 22, 229 N. E. 2d 571. It is printed herein as Appendix "A".

No Opinion was rendered by the Illinois Supreme Court. No reason was given (Appendices "C" and "D").

DOCUMENTS AND PAPERS TRANSMITTED WITH PETITION.

1. Certified Transcript of Record on Appeal.

2. Certified Transcript of Appellate Court Record.

3. Certified copy of Opinion rendered by the Illinois Appellate Court, First District (Appendix "A").

4. Certified copy of Mandate of the Illinois Appellate Court, First District (Appendix "B").

5. Certified copy of Order entered in the Illinois Supreme Court, denying petitioner's Petition for Leave to Appeal (Appendix "C").

6. Certified copy of Order entered in the Illinois Supreme Court, denying petitioner's Motion for reconsideration of the Order denying Petition for Leave to Appeal (Appendix "D").

JURISDICTION.

The judgment and Opinion of the Appellate Court of Illinois, First District, were entered August 2nd, 1967 (Appendices "A", "B", infra). The Illinois Supreme Court denied petitioner's timely Petition for Leave to Appeal, November 28, 1967 (Appendix "C", infra). The Illinois Supreme Court on January 9, 1968, denied petitioner's timely Motion for reconsideration of the Order

denying the Petition for Leave to Appeal (Appendix "D", infra). This made final the judgment of the Illinois Appellate Court, First District, and left no further appellate remedy under the laws of the State of Illinois.

The petitioner therefore invokes the jurisdiction of this Court under 28 U. S. C. A., Section 1257(3).

QUESTIONS PRESENTED.

1. Whether the State courts denied to petitioner Due Process and the Equal Protection of the established rules of law applicable for accidental death benefits, by holding that petitioner had the burden to prove, not only the accident, but to offer clear and convincing evidence eliminating all possible other causes of death, whether from disease or otherwise.

2. Whether the State courts denied to petitioner Due Process and the Equal Protection of the Laws by receiving in evidence the copy of the Coroner's certificate of death, which contains hearsay statements as to the immediate cause of death, and which said statements were not made by a treating physician or by any physician whatsoever; and said certificate of death showing on its face that no autopsy was performed; and showing that it was prepared one day after the date of death, upon information furnished to the County Coroner by a third party not before the Court.

3. Whether the State Courts denied to petitioner Due Process and the Equal Protection of the Laws, by allowing the jury to decide the issue of liability based upon the language of Certificates of Group Life Insurance upon which this action was filed, there being no issue of fact regarding said Certificates.

CONSTITUTIONAL PROVISIONS INVOLVED.

A.) Amendment XIV to the Constitution of the United States, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B.) Article VI, of the Constitution of the United States, Second Clause:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATEMENT OF THE CASE.

The petitioner brought suit in the Circuit Court of Cook County, Illinois, to recover double indemnity for accidental death benefit on certain group insurance policies issued by the respondents on the life of petitioner's husband, Theodore S. Cielen, an employee of Commonwealth Edison Company (Rec. 3-6). The claim for double indemnity arose out of a boat accident which occurred on June 9, 1963 when the decedent was in a small row boat with the petitioner, his wife, and their two-year old daughter. A power boat operated by teenagers twice sideswiped the boat

which the deceased was operating causing it to capsize and its occupants were thrown in the water. When the deceased was pulled out of the water an attempt was made to give artificial respiration but he did not revive and was pronounced dead by a local doctor who was called to the scene. The petitioner, as the widow of the decedent, requested that an autopsy be performed but said request was not complied with and without consent of the petitioner the body was delivered to a mortician to be prepared for burial. (Rec. 138-147).

The petitioner accepted the ordinary death benefits under the group policies and demanded the accidental death benefits payable thereunder (Rec. 157; Rec. 4, par. 7; Rec. 6, par. 15). When respondents refused payment, this action was filed to recover such benefits (Rec. 3-6).

Trial was had before a court and jury. The petitioner, as plaintiff, proved the facts surrounding the accident to establish a prima facie case to recover the accidental death benefits (Rec. 138-147).

The trial court judge received in evidence, over petitioner's objection, the copy of Coroner's certificate of death which contains hearsay statements as to the immediate cause of death, which said statements were not made by any physician whatsoever; and showing on its face that no autopsy was performed; and showing that it was prepared one day after the date of death, upon information furnished to the County Coroner by a third party not before the Court (Rec. 58, Exh. 1; Rec. 175-176; Rec. 98, par. 10).

The respondents, as defendants, offered medical testimony that the deceased had a history of a heart disease (Rec. 231-243).

By its instructions to the jury, the trial court judge imposed upon petitioner, as plaintiff, the burden of prov-

ing that death was not caused or contributed to by disease (Rec. 73-74; Rec. 97, pars. 7, 9), and refused to instruct the jury that respondents, as defendants, had the burden on this issue because it was an affirmative defense (Rec. 78; Rec. 97, par. 8).

The verdict and judgment were entered for the defendants below, the respondents here (Rec. 92).

The Appellate Court affirmed the trial court decision holding that the burden of proof was on the petitioner, plaintiff below, not only to prove the accident, but to offer clear and convincing evidence eliminating all possible other causes of death, whether from disease or otherwise (Appendix "A", infra). On Petition for Leave to Appeal, the Supreme Court of Illinois, denied the same. No opinion was rendered and no reason was given (Appendix "C", infra). Petitioner's Motion for reconsideration of the order denying Petition for Leave to Appeal was denied by the Illinois Supreme Court. No opinion was rendered and no reason was given (Appendix "D", infra).

Both the trial court and the Appellate Court and the Supreme Court of Illinois, erred in refusing to carry out the correct principles of law in this case, and denied to petitioner Due Process and the Equal Protection of the established rules of law applicable for accidental death benefits.

REASONS FOR GRANTING THE WRIT.

I.

It is respectfully suggested that the multitude of causes, in both the Federal and State Courts, involving the questions presented in this Petition, should prompt the Supreme Court of the United States to enunciate its authoritative pronouncements by granting this Petition.

For example, see Annotations in 84 A. L. R. 2d 176-317, 131 A. L. R. 240-269.

". . . The purpose of the insurance contract would be gravely thwarted if the clause with which we are concerned were read to exclude coverage for any loss except that resulting solely and exclusively from accidental injury, without any other contributing cause. The policy must be construed in the light of the reasonable expectation and purpose of the ordinary man when making an ordinary contract. In the words of Dean Roscoe Pound, 'The law enforces reasonable expectations arising out of conduct, relations and situations.' See Introduction to the Philosophy of Law, page 189. The view that an insurer may escape liability, when there is interplay between a pre-existing illness and an accidental injury and 'but-for' each there would not have been the resulting liability is not acceptable to this court." Carlson v. New York Life Insurance Company, 76 Ill. App. 2d 187, at 196, 222 N. E. 2d 363, at 368.

In Scanlan v. Metropolitan Life Ins. Co. (7 Cir., 1937), 93 F. 2d 942, at 946, the Court stated:

> "One may recover on an accident policy such as here in issue although the insured suffers from bodily infirmities. If the accident brought about conditions from which death resulted, the fact that the insured was ill, aged or infirm, or had bodily or mental infirmities, would not bar recovery provided the accident excited the bodily infirmity into activity and death resulted. If the infirmity alone would not have caused death, it cannot be said to have caused death when the immediate result was occasioned by an infirmity which became active only because of the accident. The infirmity may have made the insured less able to resist, but if the accident caused the condition which in turn affected the weak spot which

did not resist as well as a healthy body, the cause is nevertheless the accident, and recovery cannot be avoided or evaded (Citations)."

The rule of law quoted from the Scanlan case was adopted in Rebenstorf v. Metropolitan Life Ins. Co., 299 Ill. App. 71, on pages 84 and 85, 19 N. E. 2d 420, on pages 425 and 426. It is the Illinois Rule of Law, notwithstanding the Opinion and Decision of the Illinois Appellate Court, First District, in petitioner's case (Appendix "A" infra), which discriminatorily avoids and evades the above quoted well established Rule of Law in Illinois, which is also the majority Rule.

In Preston v. Aetna Life Ins. Co. (7 Cir., 1949), 174 F. 2d 10, at page 16 (Cert. den. 338 U. S. 829, 70 S. Ct. 80, 94 L. Ed. 504), the Court said:

"We believe that the weight of authority throughout the country supports the rule announced in the Rebenstorf, Scanlan and Nelson cases and are justified, we think, in concluding that the Supreme Court of Illinois would hold with the majority rule."

See also, Manufacturers' Accident Indemnity Co. v. Durgan, 7 C. C. A. 581, 58 Fed. 945.

"The definition of 'accident', generally assented to, is an event happening without any human agency, or, if happening through human agency, an event which, under the circumstances is unusual, and not expected to the person to whom it happens." McGlinchy v. Fidelity and Casualty Co., 14 Atl. 13, 14, 80 Me. 251, 6 Am. St. Rep. 190 (1888).

In petitioner's case, the deceased was in a small row boat with the petitioner, his wife, and their two-year old daughter. A power boat operated by teen-agers twice sideswiped the boat which the decedent was operating, causing it to capsize and its occupants were thrown in

the water. When the decedent was pulled out of the water an attempt was made to give artificial respiration, but he did not revive and was pronounced dead by a local doctor who was called to the scene (Rec. 138-147).

It has been held that "violence" within double indemnity provision of life policy covering death, affected through violent means, means any degree of force whatever. Lincoln National Life Ins. Co. v. Erickson (C. C. A. Minn. 1930), 42 F. 2d 997.

In the case of McGlinchy v. Fidelity and Casualty Co., 14 Atl. 13 at page 16, 80 Me. 251, above cited, the Court held that the subsidiary conditional clause in the policy providing that the insurance did not extend to any bodily injury of which there shall be no external or visible sign upon the body of the insured, did not apply to fatal injuries. The Court said:

> "This does not apply to fatal injuries, but only to those not resulting in death. It would be utterly unjust if this condition applied in cases of death. It would preclude recovery in all instances where death occurs by drowning, freezing, poisoning, suffocation, concussion—means of death leaving no outward mark—and also where the insured has been killed, and his body is missing."

And the Court further said (p. 16):

> "The dead body is external and visible sign enough that an injury was received."

II.

The petitioner was discriminatorily deprived of procedural Due Process of Law, and was denied the Equal Protection of the Laws, by the State court's Decision (App. "A", infra), holding that petitioner had the burden to prove, not only the accident, but to offer clear and

convincing evidence eliminating all possible other causes of death, whether from disease or otherwise. Such an impossible burden of proof upon the beneficiaries of life insurance policies with double indemnity provisions in all sudden deaths which occur in traumatic circumstances, will thwart the purpose of such life insurance policies. Moreover, it will cause and encourage mischief, misunderstanding, thereby establishing a legalistic pattern of injustices in the field of life insurance pertaining to double indemnity benefits for accidental death.

"In cases involving accident policies or other policies with accident features containing express conditions or exceptions excluding or limiting the coverage of the policy as to an injury or death which would otherwise be within such coverage * * * the burden of proving that the insured's injury or death was within such conditions or exceptions is on the insurer, and * * * the plaintiff is not under any burden of negativing application of such exceptions or conditions." 142 A. L. R. 742, 746 (1943).

The Rule of Law quoted above is so well settled that it requires no citation.

Mr. Justice Cardozo, in Silverstein v. Metropolitan Life Ins. Co., 254 N. Y. 81, at 85-86, 171 N. E. 914, at 915 (1930), stated that "the infinite interplay of causes makes it impossible to segregate any single cause as operative at any time and place to the exclusion of all others, if cause is to be viewed as a concept of science or philosophy." **Additional authorities:** Leverich v. Mutual Life Insurance Company of New York (U. S. D. C., E. D. Ill.), 139 F. Supp. 862; Sparkman v. Highway Ins. Co., 266 F. Supp. 197 (D. C. La. 1967); Letz v. World Ins. Co., 336 Ill. App. 489, 495, 496, 84 N. E. 2d 678; Scanlan v. Metropolitan Life Ins. Co., 93 F. 2d 942 (7 Cir. 1937); Preston v. Aetna Life Ins. Co., 174 F. 2d 10 (7 Cir. 1949, cert. den., 338 U. S. 829, 70 S. Ct. 80, 94 L. Ed. 504); Wolen v.

Metropolitan Life Ins. Co., 287 Ill. App. 415, 420, 421, 5 N. E. 2d 249; Dietz v. Metropolitan Life Ins. Co., 305 Ill. App. 507, 514, 27 N. E. 2d 540; Rogers v. Prudential Ins. Co., 270 Ill. App. 515, 525.

III.

The State court, over petitioner's objection, allowed in evidence the copy of the Coroner's certificate of death which contains hearsay statements as to the immediate cause of death, which were not made by a treating physician or by any physician whatsoever. Such certificate shows on its face that no autopsy was performed, and that it was prepared one day after the date of death, upon information furnished to the County Coroner by a third party not before the Court. (Rec. 58, Exh. 1; Rec. 175-176; Rec. 98, par. 10).

There was no dispute in petitioner's case regarding the fact of the death of her husband, the assured. (Rec. 3, par. 7; Rec. 5; par. 15; Rec. 157.)

In Dortch v. New York Life Insurance Company, 268 F. 2d 149 (8 Cir., 1959), the question of the admissibility of the Coroner's death certificate under an Arkansas statute, substantially similar to the Illinois statute in this regard, was considered. The Court held that the death certificate was not admissible, and at page 156, said:

"It is significant to note that the statute in question provides that the certificate or copy thereof shall be prima facie evidence of the facts therein stated. The issue of whether the death was suicidal or accidental is not a fact within the meaning of the statute. See New York Life Ins. Co. v. Anderson, 8 Cir. 1933, 66 F. 2d 705, 706. Inasmuch as all of the facts contained in the death certificate were admitted or not in dispute, and the sole

and only purpose of the offer was to get before the Jury the Coroner's personal opinion that the death was caused by suicide, we find there was no impropriety and no prejudice to the defendant in sustaining objections to the offer. The certificate was inadmissible for the purpose for which it was offered."

In Rausch v. Underwriters at Lloyds of London, 320 F. 2d 525 (C. A. Wash. 1963), it was held that the court properly excluded the Coroner's certificate that the cause of Insured's death was drowning, as being opinion or conclusion of the Coroner.

In Ziolkowski v. Continental Casualty Co., 263 Ill. App. 31, at pages 42-43, the Court said:

> "* * * that while the statute provided that such a certificate shall be prima facie evidence of the facts therein stated, it does not make such a certificate prima facie evidence of mere conclusions based upon hearsay; that 'it will be readily perceived that such a construction of the statute would lead to most dangerous and hazardous consequences.'"

And the Court further said (p. 45):

> "* * * it is the duty of the Courts to guard the rights of litigants when certificates of death are offered in evidence, lest they become 'a mere trap or device for the purpose of catching the unwary,' and when statements not authorized by the act are incorporated in a certificate, they must be treated as surplusage and excluded. * * *."

Additional authorities: Kanne v. Metropolitan Life Ins. Co., 310 Ill. App. 524, 526, 34 N. E. 2d 732; Plano Foundry Co. v. Industrial Commission, 356 Ill. 186, 193, 190 N. E. 255.

It is plain and obvious that the State court's allowance into evidence of the Coroner's death certificate was an

indirect way of placing before the Jury hearsay and unproven statements which were inadmissible, thereby depriving the petitioner of procedural Due and Orderly Process of Law and denying to petitioner the Equal Protection of the Laws.

IV.

The State court, over petitioner's objection, admitted in evidence the copies of certificates of Group Life Insurance, issued to petitioner's husband, the assured, and allowed the jury to decide the issue of liability based upon the language of such certificates, although there was no issue of fact regarding said certificates (Rec. 58, Exhibits 9 and 10; Rec. 260, 261, 262). The respondents, as defendants, had admitted that Theodore S. Cielen, petitioner's husband, was covered by the provisions of said certificates of Group Life Insurance (Rec. 25-26; Rec. 29-31).

The State Court had no authority to impose upon the jury to decide an issue of law. It is generally known that the court decides issues of law, and the jury decides issues of fact. The interpretation of the language of the certificates of the Group Life Insurance was for the trial judge and not for the jury. Treolo v. Auto Ins. Underwriters, 348 Ill. 93, 95-96, 180 N. E. 575 (Citing authority).

It has been held that it is proper to reject and exclude evidence regarding a matter about which there is no controversy. Duggan v. Ryan, 211 Ill. 133, 136, 71 N. E. 848; Jenkins v. Hollingsworth & Tabor, 83 Ill. App. 139, 141.

The decision of the Illinois Appellate Court, First District (App. "A", infra), ruling that the petitioner had the burden to prove, not only the accident, but to offer clear and convincing evidence eliminating all other possible causes of death, whether from disease or otherwise, conflicts with the well established rule of law in both Federal and State jurisdictions, and contravenes and nullifies the

Due Process, Equal Protection, and privileges and immunities Clauses of Section One, Fourteenth Amendment to the Federal Constitution.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

APPENDIX "A".

In the Appellate Court of Illinois,
First District.

Present Hon. Robert E. English, Presiding Judge.
Present Hon. John V. McCormick, Judge.
Present Hon. Joseph J. Drucker, Judge.
Leslie V. Beck, Clerk.
Joseph I. Woods, Sheriff.

Be It Remembered, That on the 2nd day of August, A. D. 1967, there was filed in the office of the Clerk of said Court, an opinion of said Court, in words and figures following, to wit:

Athena Cielen,
Plaintiff-Appellant,

No. 50736. vs.

Aetna Life Insurance Company, a Corporation, and The Travelers Insurance Company, a Corporation,
Defendants-Appellees.

Appeal from the Circuit Court of Cook County.

Mr. Presiding Justice English Delivered the Opinion of the Court.

Defendants issued group insurance policies on the life of plaintiff's husband as an employee of the Commonwealth Edison Co. After his death plaintiff was paid the basic insurance coverage under the policies ($8,000), but defendants declined payment under the double indemnity provisions covering accidental death. Plaintiff's suit therefor resulted in a jury verdict and judgment in favor of defendants, and plaintiff appeals.

The pertinent clauses of the policies provided, in substance, for the payment of additional benefits upon re-

ceipt of proof that death "resulted from accidental bodily injuries which were the direct and independent cause of death." There was also a provision that no such payment would be made for a death "caused or contributed to by disease or infection."

Plaintiff was the only witness on her own behalf and the facts which follow constitute a summary of her testimony. On July 9, 1963, the insured, plaintiff (his wife), their two-year-old daughter, and insured's nineteen-year-old nephew went on an outing to Loon Lake, Illinois. They reached the lake at about 8:00 a. m., and spent the day fishing until late afternoon when insured decided to give his little girl a boat ride before leaving for home. All four members of the family got into the boat, which was equipped with an outboard motor, and rode around the lake. During the ride some teen-agers in another boat made two very close passes on insured's boat, the second of which caused insured's boat to capsize, and all occupants were thrown into the water. Insured had been sitting in the stern of the boat near the outboard motor, and just before plaintiff hit the water she saw him hanging onto the motor. Plaintiff sank into the water three times, and when she came up the third time she saw insured flopped on the bottom of the overturned boat and noticed that the motor was no longer attached. She saw that her husband "had a strange look, like he was looking into space."

With the aid of some fisherman, insured and his family were pulled alongside other boats some 1,000 feet to a pier on the lake shore. Insured was helped up onto the pier by being pushed from below and pulled by his arms from above. Plaintiff was standing on the pier with insured in her arms, when "he fell flat on his face on the pier." The nephew attempted artificial respiration until police and a rescue squad arrived with a pulmotor which they used for an additional 20 minutes, but all efforts to revive

insured were unsuccessful. A doctor arriving on the scene shortly thereafter pronounced him dead. Although plaintiff was told by the police that she could not get her husband's body for 48 hours, she did see the body at about 1:00 p. m. the next day at a funeral parlor in Chicago. Plaintiff never gave authorization for an autopsy and none was ever performed.

The insured had been hospitalized for treatment of a heart condition from May 13 to June 30, 1959 and from January 30 to March 13, 1960. He was also under the care of Dr. Edward Malachowski for some period of time, and at the doctor's direction had been hospitalized again from February 22 to February 28, 1963 for an acute respiratory infection. During that time an electrocardiogram was made.

Defendants presented motions for a directed verdict at the close of plaintiff's case. They were denied, and defendants then proceeded with the introduction of evidence on their own behalf. This evidence was in no way helpful to the establishment of plaintiff's case, and in view of the conclusion which we reach in this case, we shall not include a recitation of the defense testimony in this opinion.*

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* For example, Dr. Malachowski testified that he began treating the insured on May 23, 1960 with a diagnosis of coronary insufficiency; and that when the insured was in the hospital in 1963 for the respiratory infection, he reaffirmed the existence of the heart condition. In answer to a hypothetical question based upon the circumstances of the insured's death as disclosed by the evidence, and upon the insured's physical condition as testified to by him, Dr. Malachowski gave it as his opinion that the prior medical history could possibly have been related to the hypothetical person's death; that a damaged heart could very readily give up under excessive stress and strain; and that the occurrence described and the pathological condition of the heart could, working together, operate to cause the death. On cross-examination he testified that under the hypothetical circumstances there could have been a rupture of the aorta, or the pericardium, without pre-existing disease, or the hypothetical man could have drowned.

A great deal of the argument presented on this appeal concerns the question of whether the insured's preexisting heart condition excuses payment under the clause in the policies which exclude payment for death "caused or contributed to by disease or infection." Although we are inclined to agree with plaintiff's position, we do not decide this question. Instead, we affirm the judgment below on the ground that plaintiff failed to introduce any evidence to prove as required by the policies that the death of the insured "resulted from accidental bodily injuries which were the direct and independent cause of death." **Schroeder v. Police & Fireman's Ins. Ass'n.**, 300 Ill. App. 375, 383-384. Defendants correctly argue that a verdict should have been directed on their motion at the close of plaintiff's case. **Pedrick v. Peoria & Eastern R. R. Co.**, ... Ill. 2d ... (No. 39717). As this Court held in **Wellner v. New York Life Ins. Co.**, 331 Ill. App. 360, 364:

> Under the double indemnity clause, before the plaintiff can recover the burden is upon him to prove that insured's death occurred through external, violent and accidental means. This is the rule clearly laid down in **Fidelity & Casualty Co. v. Weise**, 182 Ill. 496, **Smith v. Metropolitan Life Ins. Co.**, 317 Ill. App. 624, and **Gray v. Metropolitan Life Ins. Co.**, 308 Ill. App. 1.

In **Smith v. Metropolitan Life Ins. Co.**, 317 Ill. App. 624, 629-30, we reviewed a double indemnity clause and held:

> * * * it is incumbent upon the plaintiff to allege that the insured died through accidental means; otherwise his complaint would not state a cause of action; and having made that allegation, it is incumbent upon him to sustain it by a preponderance of the evidence. * * * In the first instance plaintiff is required to make a prima facie case showing that the death was accidental.

Plaintiff's evidence in the instant case failed utterly to prove any bodily injury sustained by her husband. Such an accidental bodily injury is not established by proof of exposure and exhaustion. **Linnane v. Aetna Brewing Co.**, 99 Atl. 507, 509. Her evidence consisted merely of a recitation of the events of the day upon which her husband died. There was no evidence as to cause of death beyond her description of her husband immediately after the boat capsized as having "a strange look, like he was looking into space," and her testimony that after they helped him onto the dock he collapsed and could not be revived. This is not sufficient, and a jury should not be permitted to speculate that under such circumstances there might have been a bodily injury of some kind and that death might have been caused thereby.

Of the many cases to which we have been cited by plaintiff, none involves a situation where the accident could not be traced directly to the death, and all involved accidents which resulted in bodily injury. **Letz v. World Ins. Co.**, 336 Ill. App. 489 (bruises on elbow and shoulder with injury to chest, and medical evidence that these injuries caused a blood clot which resulted in death); **Rebenstorf v. Metropolitan Life Ins. Co.**, 299 Ill. App. 71 (acerbation of gall bladder condition requiring surgery, which was followed by a fatal heart attack); **Scanlan v. Metropolitan Life Ins. Co.**, 93 F. 2d 942 (7th Cir., 1937) (bruised leg in area of varicose veins, with medical evidence that the bruise produced a blood clot which caused death); **Preston v. Aetna Life Ins. Co.**, 174 F. 2d 10 (7th Cir., 1949) (stubbed toe with ulcer developing followed by amputation of leg); **Sturm v. Employers' Liability Assur. Corp., Ltd.**, 212 Ill. App. 354 (finding of insured dead under water in a bathtub held prima facie evidence of accidental drowning); **Plano Foundry Co. v. Industrial Comm.**, 356 Ill. 186 (a cut which developed a streptococcus infection with medical evidence that this caused

death). We have not found any authority for the proposition that in the absence of such proof of injury, as is present in the cited cases, recovery may be had under the type of double indemnity policy with which this appeal is concerned.

Our decision as to the failure of plaintiff's proof renders unnecessary discussion of alleged trial errors advanced on this appeal. Her claim for payment of interest and attorney's fees also fails, since Ill. Rev. Stat., 1963, ch. 74, § 2, and ch. 73, § 767, are based upon wrongful withholding, and are not available to an unsuccessful litigant. **Howard Foundry Co. v. Hartford Fire Ins. Co.**, 222 F. 2d 767, 770 (7th Cir., 1955), cert. denied 350 U. S. 885; **First National Bank v. Boston Ins. Co.**, 17 Ill. App. 2d 159, 170.

The judgment of the Circuit Court is affirmed.

Affirmed.

Drucker and McCormick, JJ., concur.

I, Leslie v. Beck, Clerk of the Appellate Court, in and for the First District of the State of Illinois and keeper of the records, files and seal thereof, Do Hereby Certify That the foregoing is a true copy of the opinion of the said Appellate Court in said cause, as appears of record in my office.

In Testimony Whereof, I have set my hand and affixed the seal of the said Appellate Court, at Chicago, this 26th day of March in the year of our Lord one thousand nine hundred and sixty-eight.

Leslie V. Beck,
Clerk of the Appellate Court of
the First District, Illinois.

(Seal)

APPENDIX "B".

In the Appellate Court of Illinois,
Fifth District.

Present Hon. Robert E. English, Presiding Judge.

Present Hon. John V. McCormick, Judge.

Present Hon. Joseph J. Drucker, Judge.

Leslie V. Beck, Clerk.

Joseph I. Woods, Sheriff.

Athena Cielen, Appellant, No. 50,736. vs. Aetna Life Insurance Company, a Corporation, and The Travelers Insurance Company, a Corporation, Appellees.	Appeal from Cook Circuit. Error to ..... Trial Court No. 63-S-34520.

The judgment of the Circuit Court of Cook County is Affirmed.

It is further ordered by the Court that the said Aetna Life Insurance Company, a corporation, Certain Appellee, recover its costs from Appellant.

It is further ordered by the Court that the said The Travelers Insurance Company, a corporation, Certain Appellee, recover its costs from Appellant.

Execution may issue.

Entered: August 2nd, 1967.

I, Leslie V. Beck, Clerk of the Appellate Court, in and for the First District of the State of Illinois, and keeper of the records, files and seal thereof, Do Hereby Certify, That the foregoing is a true copy of a final order and

judgment entered in said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I have set my hand and affixed the seal of the said Appellate Court, at Chicago, this 27th day of March in the year of our Lord one thousand nine hundred and sixty-eight.

Leslie V. Beck,
Clerk of the Appellate Court of
the First District, Illinois.

APPENDIX "C".

United States of America.

State of Illinois } ss.
Supreme Court }

At a Term of the Supreme Court, begun and held in Springfield, on Monday the thirteenth day of November in the year of our Lord, one thousand nine hundred and sixty-seven, within and for the State of Illinois.

Present: Roy J. Solfisburge, Jr., Chief Justice
Justice Walter V. Schaefer
Justice Byron O. House
Justice Thomas E. Kluczynski
Justice Ray I. Klingbiel
Justice Robert C. Underwood
Justice Daniel P. Ward
William G. Clark, Attorney General
Robert G. Miley, Marshal

Attest: Mrs. Earle Benjamin Searcy, Clerk

Be It Remembered, that, to-wit: on the 28th day of November, 1967, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

Athena Cielen, Petitioner, No. 40951. vs. Aetna Life Insurance Company, a Corporation, and The Travelers Insurance Company, a Corporation, Respondents.	Petition for Leave to Appeal from Appellate Court First District 50736.

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now

fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that said Respondents recover of and from the said Petitioner costs by them in this behalf expended, to be taxed, and that they have execution therefor.

I, Clell L. Woods, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 26th day of March, 1968.

Clell L. Woods,
Clerk, Supreme Court of the
State of Illinois.

APPENDIX "D".

United States of America.

State of Illinois
Supreme Court } ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of January in the year of our Lord, one thousand nine hundred and sixty-eight, within and for the State of Illinois.

Present: Roy J. Solfisburg, Jr., Chief Justice
Justice Walter V. Schaefer
Justice Byron O. House
Justice Thomas E. Kluczynski
Justice Ray I. Klingbiel
Justice Robert C. Underwood
Justice Daniel P. Ward
William G. Clark, Attorney General
Robert G. Miley, Marshal

Attest: Mrs. Earle Benjamin Searcy, Clerk

Be It Remembered, that, to-wit: on the 9th day of January, A. D. 1968, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

Athena Cielen, Petitioner, No. 40951. vs. Aetna Life Insurance Company, a Corporation, and The Travelers Insurance Company, a Corporation, Respondents.	Petition for Leave to Appeal from Appellate Court First District 50736.

And now, on this day, the Court having duly considered the motion by petitioner for reconsideration of order deny-

ing petition for leave to appeal, and being now fully advised of and concerning the premises;

It Is Hereby Ordered that the motion by petitioner for reconsideration of order denying petition for leave to appeal be, and the same is, denied.

I, Clell L. Woods, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of an order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 26th day of March, A. D. 1968.

Clell L. Woods,
Clerk, Supreme Court of the
State of Illinois.

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No. 1298

In the

Supreme Court of the United States

OCTOBER TERM, 1967.

ATHENA CIELEN,

Petitioner,

vs.

AETNA LIFE INSURANCE COMPANY, a Corporation, and THE TRAVELERS INSURANCE COMPANY, a Corporation,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

No. 1298

ATHENA CIELEN,

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AETNA LIFE INSURANCE COMPANY, a Corporation, and THE TRAVELERS INSURANCE COMPANY, a Corporation,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

This is an Illinois state court suit seeking double indemnity benefits under two life insurance policies. After trial, the jury returned a verdict for the respondent insurance companies. On appeal, the intermediate appellate court affirmed; the court held that plaintiff had adduced no evidence whatsoever to prove "accidental bodily injuries which were the direct and independent cause of death," as required by the policies. Since petitioner had the burden to make at least a prima facie showing on this issue and failed to do so, the appellate court stated that respondents would have been entitled to a judgment as

a matter of law, even if the jury had not held in their favor.

The Illinois Supreme Court denied a petition for leave to appeal and a motion for reconsideration of that denial.

Petitioner now seeks certiorari to review the appellate court's judgment.

REASONS FOR DENYING THE WRIT

I. THE FEDERAL QUESTIONS WERE NOT RAISED BELOW.

At no stage of the lower court proceedings did the petitioner raise any of the three constitutional questions purportedly presented in the petition. The questions were not raised in either the trial court or the appellate court; nor did petitioner raise the questions in her petition for leave to appeal to the Illinois Supreme Court, or in her motion for reconsideration of the denial of such petition. There is accordingly nothing here for this Court to review.

Rule 23(f) requires the petitioner to specify the stages of the lower court proceedings in which the federal questions were raised, the manner and method in which they were raised, and the way in which they were passed upon by the lower courts. The petitioner here does not (and cannot) make any attempt to comply with the Rule. The petition should accordingly be denied.

II. THE PETITION IS NOT CERT-WORTHY.

Even if petitioner's "questions presented" had been raised and decided below, there would be no warrant whatever for review by this Court. The decision below is clearly correct; it holds only that petitioner failed to meet her well-settled burden to make a prima facie show-

ing that the death of the insured was the result of accidental bodily injury. Accord: *Fidelity & Casualty Co. of New York* v. *Weise*, 182 Ill. 496, 500 (1899); *Wellner* v. *New York Life Insurance Co.*, 331 Ill. App. 360, 364 (1947); *Smith* v. *Metropolitan Life Insurance Co.*, 317 Ill. App. 624, 629 (1943); 46 C.J.S., Insurance, Sec. 1319(c), pg. 443. There is no conflict of decisions; the case has no far-reaching implications; and there are no special or important reasons for review by this Court.

CONCLUSION

The petition should be denied.

Respectfully submitted,

JOHN M. O'CONNOR, JR.
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No. 1298

In the Supreme Court of the United States

OCTOBER TERM, 1967.

ATHENA CIELEN,

Petitioner,

vs.

AETNA LIFE INSURANCE COMPANY, a Corporation, and THE TRAVELERS INSURANCE COMPANY, a Corporation,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

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ATHENA CIELEN,

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vs.

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Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

The petitioner prays that this Court grant a rehearing of its Order of May 20, 1968, denying the Petition for Writ of Certiorari, and that a Writ of Certiorari issue to review the judgment of the Illinois Appellate Court, First District, in the above-entitled case as prayed in the Petition filed April 8, 1968, herein.

The said judgment of the Illinois Appellate Court, First District, was made final by the Order of denial by the Illinois Supreme Court, on January 9, 1968, of petitioner's Motion for reconsideration of the Order of the Illinois Supreme Court, denying Petition for Leave to Appeal. (Appendices "B", "C" and "D", pages 21-26 of Petition filed April 8, 1968, herein.) Therefore, the judgment of the Illinois Appellate Court, First District, is the judgment reviewable under 28 U.S.C.A., Section 1257. *Sullivan* v. *Texas,* 207 U.S. 416; *American Ry. Exp. Co.* v. *Levee,* 263 U.S. 19, 20-21; *Hammerstein* v. *Superior Court,* 341 U.S. 491, 492; *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U.S. 157, 160.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

Under Illinois practice, custom and usage, the denial of the Petition for Writ of Certiorari, is asserted as being tantamount to an adjudication on the merits, affirming the decision and Opinion of the Illinois Appellate Court (*Cielen* v. *Aetna Life Insurance Company, et al.*, 86 Ill. App.2d 22, 229 N.E.2d 571, Appendix "A", pages 15-20 of Petition), which held that the petitioner, as plaintiff, had the burden to prove, not only the accident, but to offer clear and convincing evidence eliminating all possible other causes of death, whether from disease or otherwise.

Obviously such a requirement discriminatorily deprives the petitioner, as plaintiff, of the Equal Protection of the Law applicable for accidental death benefits, and of Due Process of Law, and is in direct conflict with the authorities cited on pages 7-11 of the Petition for Writ of Certiorari.

Petitioner filed her Petition for Certiorari with the earnest hope and reliance on the profound wisdom of this Court for guidance, by granting her Petition with the resultant authoritative pronouncement of this Court expressed in an Opinion, which would discourage and deter the prevalent mischief, misunderstanding and injustices, as shown by conflicting decisions, which impose an impossible burden of proof upon the beneficiaries of life insurance policies with double indemnity provisions in sudden deaths which occur in traumatic circumstances.

Obviously, such impossible burden perverts and thwarts the purpose of such life insurance policies and is tantamount to impairment of the obligations of the insurance contracts for accidental death benefits, which is prohibited

by Article I, section 10, of the Constitution of the United States.

The Illinois Appellate Court Opinion and decision in the above entitled case, filed August 2, 1967, (Appendix "A", pages 15-20 of Petition filed April 8, 1968), is also in conflict with the Opinion and decision of the Illinois Appellate Court, in *Carlson* v. *New York Life Insurance Company,* 76 Ill.App.2d 187, 222 N.E.2d 363, involving accidental benefits, under an accident insurance policy. In this case, the Court's Opinion made an exhaustive analysis citing numerous cases and overruled the holding in *Welte* v. *Metropolitan Life Ins. Co.,* 305 Ill. App. 120, 27 N.E.2d 63 (1940).

Petitioner, under the Statement of the Case in her Petition filed April 8, 1968, pages 4-6, made specific references to the Certified Transcript of Record on Appeal, which was transmitted to this Court.

It is inherent in the Opinion and decision of the Illinois Appellate Court in the instant case (Appendix "A", pages 15-20), that petitioner, as plaintiff, was deprived of the equal protection of the established rule of law applicable to accidental death benefits, by holding that petitioner had the burden to prove not only the accident, which the petitioner did prove, (Rec. 138-147), but to offer clear and convincing evidence eliminating all possible other causes of death, whether from disease or otherwise.

It is plain and obvious that such Opinion of the Illinois Appellate Court systematically avoids and evades the petitioner's proof of her husband's accidental death, (Rec. 138-147), and the established rule of law applicable to accidental death benefits under policies of insurance.

As stated in *Carlson* v. *New York Life Insurance Company,* 76 Ill.App.2d 187, at 196, 222 N.E.2d 363, at 368,

"The body of law on this subject is vast and varied. See Annotations: 131 A.L.R. 240-269; 84 A.L.R.2d 176-317."

Petitioner respectfully submits that this is another compelling reason for this Court to consider, and to grant a rehearing of its Order of May 20, 1968, denying the Petition for Writ of Certiorari, and to issue a Writ of Certiorari to review the judgment of the Illinois Appellate Court, First District, in the instant case, as prayed in the Petition filed April 8, 1968.

Petitioner respectfully asks that equal and uniform justice, which is guaranteed by the Due Process and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, be granted to her.

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Appellate Court of the State of Illinois, First Judicial District.

Respectfully submitted,

PETER S. SARELAS,
30 North La Salle Street,
Chicago, Illinois 60602,
Attorney for Petitioner,
Athena Cielen.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Peter S. Sarelas, Attorney for Petitioner.